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No. 00-151

Supreme Court, U.S.
FILED
OCT 30 2000
CLERK

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATED QUESTION PRESENTED

Whether a court has equitable discretion to consider a request to modify an injunction where the enjoined party asserts the defense of medical necessity in a civil injunction action under 21 U.S.C. § 882, and establishes through uncontroverted evidence that there is a class of seriously ill patients who would otherwise suffer imminent harm and who have absolutely no other legal alternative.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Defendants and Respondents, Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (hereafter collectively "OCBC"), respectfully request that the Petition for a Writ of Certiorari filed by Plaintiff and Appellant the United States of America be denied.

STATEMENT OF THE CASE

Much has occurred since the Court of Appeals issued the opinion that the government now challenges, *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999) (per curiam) ("*OCBC I*"), on September 13, 1999.

On July 25, 2000, the government noticed an appeal from the district court's July 17, 2000, Order (App. 12a-14a) and July 17, 2000, Amended Preliminary Injunction Order (App. 15a-17a). That second appeal, *United States v. Oakland Cannabis Buyers' Cooperative*, Ninth Circuit Case No. 00-16411 ("*OCBC II*"), remains pending. Despite the pendency of *OCBC II*, on July 28, 2000, the government filed a Petition for a Writ of Certiorari.

On August 11, 2000, the Court of Appeals denied the government's request for a stay of the district court's July 17, 2000, Orders. *See* App. A1-A2. The Court of Appeals did, however, accelerate the briefing schedule in *OCBC II*. *See* App. A3-A4.

On August 29, 2000, this Court granted the government's request for a stay of the district court's July 17, 2000 orders "pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of this Court." *United States v. Oakland Cannabis Buyers' Cooperative*, 530 U.S.___, 69 U.S.L.W. 3165 (Aug. 29, 2000). The stay effectively reinstated the broad

preliminary injunction in place before the Court of Appeals issued its opinion in *OCBC I*. Thus, OCBC is not currently permitted to distribute medical cannabis to its seriously ill and dying patients, regardless of whether those patients meet the legal standard for medical necessity set forth in *OCBC I* and the district court's July 17, 2000, Orders. The government now stands in exactly the same position it occupied before the Court of Appeals ruled in *OCBC I*. Justice Stevens dissented from this Court's order issuing the stay, stating:

> Because the [government] has failed in this case to demonstrate that the denial of necessary medicine to seriously ill and dying patients will advance the public interest or that the failure to enjoin the distribution of such medicine will impair the orderly enforcement of federal criminal statutes, whereas [OCBC has] demonstrated that the entry of a stay will cause them irreparable harm, I am persuaded that a fair assessment of that balance favors a denial of the extraordinary relief that the government seeks.

Because of the accelerated briefing schedule set forth in the Court of Appeals' August 11, 2000, Order, briefing was completed in *OCBC II* on October 10, 2000. On October 26, 2000, OCBC requested that the Court of Appeals expedite the disposition of *OCBC II*. *See* App. A5-A14.

REASONS TO DENY THE PETITION

In November 1996, the voters of California passed Proposition 215, the Compassionate Use Act of 1996 ("The Act"). Cal. Health & Safety Code § 11362.5. "The Act makes it legal under California law for seriously ill patients and their primary caregivers to possess and cultivate marijuana for use by the seriously ill patient if the

patient's physician recommends such treatment. In particular, it exempts a seriously ill patient, or the patient's primary caregiver, from prosecution . . . relating to the possession of marijuana and . . . the cultivation of marijuana." *United States v. Cannabis Cultivators' Club*, 5 F. Supp. 2d 1086, 1091 (N.D. Cal. 1998). Pursuant to Proposition 215, OCBC, a not-for-profit organization, was established to meet the needs of seriously ill and dying patients. OCBC's goal is to provide seriously ill patients with safe access to necessary medicine so that these individuals do not have to resort to the streets, thereby exposing themselves to criminal elements and products of dubious quality.

Also pursuant to California law, the City of Oakland established a medical cannabis distribution program and designated OCBC as the City's agent to administer the program. OCBC is a well-run, professional organization that has served the medical needs of seriously ill patients and has worked with law enforcement to ensure that those with legitimate medical needs may obtain medical-quality cannabis safely, and without fear of criminal involvement.

Despite the fact that the voters of California have spoken, the federal government brought a civil injunctive proceeding under 21 U.S.C. § 882 to block OCBC's distribution of medical cannabis to those suffering from severe illnesses. The government's decision to use Section 882 in this case makes this case virtually unique. According to the district court (Hon. Charles R. Breyer), Section 882 has been used in only five published decisions since Congress enacted it as part of the Controlled Substances Act ("CSA") in 1970. *Cannabis Cultivators' Club*, 5 F. Supp. 2d at 1104. The government has never attempted

to prosecute OCBC criminally under the CSA or any other law.

In May 1998, the district court granted the government's request for a preliminary injunction. *Id.* at 1106. On October 15, 1998, OCBC requested that the district court modify the injunction to allow distribution of cannabis to patients who meet the legal test of necessity derived from *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). The district court summarily denied the requested modification on October 16, 1998, because it concluded it lacked discretion to grant OCBC's motion.

Recognizing the danger to public health and safety posed by the closure of OCBC, on October 27, 1998, the Oakland City Council issued Resolution No. 74618 declaring a Local Public Health Emergency with Respect to Safe, Affordable Access to Medical Cannabis in the City of Oakland. The Resolution found that closure of OCBC impairs public safety, and that OCBC's closure would harm seriously ill Oakland residents. The Resolution declares a public health emergency and urges the federal government to cease actions "that pose obstacles to access to cannabis for Oakland residents. . . . " Resolution No. 74618 (Local Public Health Emergency with Respect to Safe, Affordable Access to Medical Cannabis in the City of Oakland). The City of Oakland has since renewed this resolution every two weeks.

On September 13, 1999, the Court of Appeals issued an opinion in this case explicitly recognizing that seriously ill patients who meet the legal definition of medical necessity may lawfully obtain medical cannabis for their illnesses despite these injunctive proceedings. *OCBC I*, 190 F.3d 1109 (9th Cir. 1999). In so doing, the Court of Appeals reversed the district court's order summarily

denying OCBC's request to modify the injunction to permit distribution to patient-members with a medical necessity, and directed that the district court reconsider its decision. *Id.* at 1114-1115.

The Court of Appeals reasoned:

> The district court summarily denied OCBC's motion, saying that it lacked the power to make the requested modification because "its equitable powers do not permit it to ignore federal law." In doing so, the district court misapprehended the issue. The court was not being asked to ignore the law. It was being asked to take into account a legally cognizable defense that likely would pertain in the circumstances.

Id. at 1114.

The Court of Appeals also held that the district court erroneously failed to weigh the public interest when it summarily denied the requested modification:

> The district court erred in another respect as well. In deciding whether to issue an injunction in which the public interest would be affected, or whether to modify such an injunction once issued, a district court *must* expressly consider the public interest on the record. The failure to do so constitutes an abuse of discretion. . . .

Id. at 1114 (*emphasis added*).

The Court of Appeals (*see OCBC I*, 190 F.3d at 1114-1115) and the district court (*see* App. 12a-14a) have found that a balancing of equities favors such an exception in this case. As the Court of Appeals explained in *OCBC I*:

> OCBC has identified a strong public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses. Indeed,

> the City of Oakland has declared a public health emergency in response to the district court's refusal to grant the modification under appeal here. Materials submitted in support of OCBC's motion to modify the injunction show that the proposed amendment to the injunction clearly related to a matter affecting the public interest. Because the district court believed that it had no discretion to issue an injunction that was more limited in scope than the Controlled Substances Act itself, it summarily denied the requested modification without weighing or considering the public interest.

OCBC I at 1114-1115.

In view of this background, the government's petition seeks review of a dispute that is not ripe for this Court's intervention. The Court of Appeals has not had an opportunity to rule on the merits of the government's appeal from the district court's order modifying the preliminary injunction. The government offers no justification for bypassing the Court of Appeals and deciding issues on a record that is not fully developed. On this basis alone, the petition should be denied.

Moreover, the petition itself presents no "compelling" reason for review as required by Supreme Court Rule 10 and should be denied for this additional reason. The government both mischaracterizes and overstates the significance of *OCBC I*. *OCBC I* neither legalized the use of cannabis by the general public, nor did it make sweeping pronouncements about the applicability of the necessity defense to facts other than those before the Court of Appeals. Rather, the Court of Appeals held that a district court has equitable jurisdiction to consider a request to modify an injunction where the enjoined party presents facts that raise the applicability of the necessity defense. The criteria for necessity that the Court of Appeals

directed the district court to consider, and that the district subsequently adopted, are narrow and specific, and by no means make the drug laws unenforceable, as the government contends. The government remains free after *OCBC I* to prosecute anyone that it believes to be violating the federal drug laws.

OCBC I does not represent a conflict with any circuit, nor does it represent a departure from established precedent or from established judicial proceedings. Sup. Ct. R. 10(a). In remanding the case to the district court, the Court of Appeals in *OCBC I* relied upon controlling precedent (*Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)) concerning the district courts' traditional equitable discretion to fashion injunctive relief. In this case, the government elected to enforce criminal drug laws through the unusual means of an equitable injunction. Because the government chose this equitable remedy, the Court of Appeals correctly held that "since the government chose to deal with potential violations on an anticipatory basis," the injunction must be "narrow enough to exclude conduct that likely would be legally privileged or justified." *OCBC I*, 190 F.3d at 1114.

In remanding the case to the district court, the Court of Appeals in *OCBC I* also expressly relied upon *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). *Aguilar* has been the law of the circuit for over a decade, it confirms well-established principles regarding necessity, and it creates no conflict with other circuits.

In sum, there is no basis for granting the government's petition. The petition should be denied.

A. The Dispute Is Not Ripe for Review By this Court

The government seeks review of an interlocutory order of the Court of Appeals entered on September 13, 1999, remanding this case to the district court, and directing the district court to exercise its equitable discretion to consider modification of a preliminary injunction prohibiting OCBC from providing medical cannabis to seriously ill patients. Since that order was entered over one year ago, the district court has complied with the remand order. OCBC offered significant new evidence which was not part of the record before the Court of Appeals in *OCBC I*, including additional affidavits from patients and physicians demonstrating that serious medical conditions could be relieved and imminent harm avoided only if the preliminary injunction were modified, and documenting the declaration of a medical emergency by the City of Oakland. Additional briefing was submitted to the district court, including the *Amicus Curiae* Brief of the California Medical Association. At the conclusion of these proceedings, and after the government declined to offer any additional evidence, the district court exercised its equitable jurisdiction to modify the preliminary injunction, exempting from the injunction the distribution of cannabis to a small and narrowly defined group of seriously ill patients who meet the legal criteria for necessity set forth in the amended injunction.

The government has since appealed the district court's order of modification. Rather than intervene with a grant of certiorari while the review of the district court's amended injunction is pending before the Court of Appeals, this Court should await the resolution of the issues currently before the Court of Appeals. If review is then found to be appropriate, this Court will have before

it the entire record, including the proceedings on remand. To limit the Court's review to the original order of remand entered a year ago, while a review of the actual modification after remand is still unresolved, would disrupt the orderly administration of justice, result in piecemeal review, and deprive this Court of a fully developed record.

Although the government has included in the Appendix to its Petition for Certiorari the district court's July 17, 2000, Order [Appendix B] and the Amended Preliminary Injunction Order [Appendix C], these orders are not part of the record they seek to review. The government cannot seriously contend that this Court should bypass the Court of Appeals and rule on the government's appeal from the district court's amended injunction order without first allowing the Court of Appeals to render an opinion regarding that order. *See* 28 U.S.C. §§ 1254(1) & 2101(E); Sup. Ct. R. 11 (certiorari before entry of judgment in the Court of Appeals "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"); *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J.) (certiorari before judgment in the Court of Appeals is an "extremely rare occurrence").

This Court generally awaits final judgment in the lower courts before exercising its certiorari jurisdiction. Ordinarily, "this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384

(1893). Because the government has obtained a stay of the district court's amended injunction, the government plainly suffers no inconvenience if this Court declines to grant the petition.

In recent years, the Solicitor General has been a strong advocate of the denial of certiorari to review interlocutory orders when such review was sought by criminal defendants. As noted in R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice*, § 4.18, p. 196 n.60 (7th Ed. 1993):

> Since 1980, the Solicitor General consistently has argued in federal criminal cases that the interlocutory status of a case is a sufficient ground for denial of certiorari when review is sought by a defendant. The Solicitor General has maintained that judicial efficiency would be better served by deferring review until rendition of final judgment, so that all claims can be presented in a single petition if, in fact, the defendant is convicted. The Supreme Court has not granted certiorari in such a situation since 1980, which may reflect its general agreement with the Solicitor General's position.

Although this is not a criminal case, of course, it does involve the enjoining of alleged violations of a federal criminal statute, and the same considerations of judicial efficiency are presented. There are very likely to be other claims to be addressed by this Court in the context of reviewing a final judgment in this matter. In fact, the Court of Appeals deferred considering several significant issues because of the interlocutory nature of OCBC's appeal of the preliminary injunction, including the question of OCBC's complete immunity under the CSA because its officers are local government officials engaged in the enforcement of a law relating to controlled substances. *See* 21 U.S.C. § 885.

In the courts below, OCBC also argued that in light of the Compassionate Use Act of 1996, the Ninth and Tenth Amendments of the Constitution protect OCBC's activities. The lower courts chose not to address these issues, but they provide alternate grounds for the lower courts' decisions. Moreover, OCBC also raised other issues that provide alternate grounds for the Court of Appeals' decision, including violation of patient-members' substantive due process rights.

The pendency of a Court of Appeals' remand has, on numerous occasions, been viewed as a strong reason to deny a petition for a writ of certiorari by this Court. In *Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328, 560 (1967) (per curiam), this Court denied certiorari to review contempt orders issued against a labor union for violating a temporary restraining order forbidding a strike, because the Court of Appeals had remanded to the district court after resolving the legal issues the petitioner sought to review, to allow the district court to exercise its equitable jurisdiction to review the severity of the sanction. "However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied. *Id.* at 328. *See Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 257-258 (1916)." *See generally* R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice*, § 4.18, pp. 224-26 (6th Ed. 1986).

Even more closely analogous was the recent case of *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). There, the petitioner sought certiorari after the Court of Appeals vacated a judgment in its favor, and remanded the case to the district court for determination of an appropriate remedy. The petitioner contended that no remedy was appropriate, since the Court of Appeals

erred in finding a constitutional violation in its policy of restricting admission to a state military college to male applicants. This Court denied certiorari, and Justice Scalia authored an opinion noting the importance of the issues raised, but concluding it was prudent to await resolution of the remedy in the courts below. Subsequently, after the district court's remedial order had been upheld by the Court of Appeals, 44 F.3d 1229 (4th Cir. 1995), this Court granted certiorari. 516 U.S. 910 (1995). The issues presented were then resolved on a complete record. *United States v. Virginia*, 518 U.S. 515 (1996).

The issue now pending in the Court of Appeals after the remand will actually present the question the government seeks to review with greater clarity and less ambiguity than the year-old remand order. The question allegedly presented in this case, as posed by the government, is "Whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, forecloses a medical necessity defense to the Act's prohibition against manufacturing and distributing marijuana, a Schedule I controlled substance." *See* Petition for a Writ of Certiorari, p. I. The remand order, however, addressed this question only indirectly and tangentially. The question *actually* decided by the Court of Appeals a year ago was whether a district court had equitable jurisdiction to consider a request to modify an injunction where the enjoined party asserts the defense of medical necessity. Now that the remand has been adjudicated, and the district court has modified the injunction to recognize the availability of the defense, the question the government propounds is squarely presented, not to this Court, *but to the Court of Appeals for the first time.* While this Court has the power to grant a writ of certiorari before judgment by the Court of Appeals, in

exercising this power, the Court is guided by the statement in Rule 18 that

> [a] petition for a writ of certiorari to review a case pending in a United States Court of Appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

As noted in R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice*, § 4.20, p. 199 (7th Ed. 1993), "[t]he public interest in a speedy determination must be exceptional, however, to warrant skipping the court of appeals in this fashion." Even where this Court has found great public importance, it has awaited Court of Appeals adjudication where the Court of Appeals recognized "the vital importance of the time element in this litigation" and acted in "ample time." *Aaron v. Cooper*, 357 U.S. 566, 567 (1958) (The Little Rock School Desegregation Case). Here, of course, the Court of Appeals has already expedited consideration of the government's appeal from the district court's order entered after remand.

For all these reasons, this dispute is not ripe for review. Accordingly, the petition should be denied.

B. The Law Governing this Case Is Well Settled and Does Not Require Clarification on Certiorari

1. *OCBC I* Correctly Directed the District Court to Exercise Its Equitable Jurisdiction

OCBC I does not depart from established legal precedent, and the issue determined in that case – the equitable jurisdiction of the district court – does not warrant review by this Court. As Justice Stevens recognized, the

issues raised in the present petition are governed by controlling Supreme Court precedent: *Romero-Barcelo*, 456 U.S. 329-330. *See United States v. Oakland Cannabis Buyers' Cooperative*, 530 U.S.___, 69 U.S.L.W. 3165 (Aug. 29, 2000) (Stevens, J., dissenting). *Romero-Barcelo* and many other Supreme Court and Court of Appeals' decisions[1] hold that when, as in Section 882, Congress grants the district courts jurisdiction to issue civil injunctions to enjoin future federal statutory violations, "[t]he [mere] grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation." *Romero-Barcelo*, 456 U.S. at 313. Instead, absent an "unequivocal statement of [Congress'] purpose" to "make such a drastic departure from the traditions of equity practice" by making issuance of an injunction mandatory, an injunction is not mandatory even if the conduct to be enjoined indisputably violates

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[1] *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541-542 (1987); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *The Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944); *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358-1361 (5th Cir. 1996); *Sierra Club v. Federal Deposit Ins. Corp.*, 992 F.2d 545, 551-552 (5th Cir. 1993); *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156 (9th Cir. 1988) (cited in *OCBC I*, 190 F.3d at 1114); *The Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992); *Natural Resources Defense Council, Inc. v. Texaco Refining & Mktg., Inc.*, 906 F.2d 934, 938-939 (3rd Cir. 1990); *National Labor Relations Bd. v. P*I*E* Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990); *The Town of Huntington v. Marsh*, 884 F.2d 648, 651-652 (2d Cir. 1989); *Kinney v. Pioneer Press*, 881 F.2d 485, 490-491 (7th Cir. 1989); *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 323-324 (D.C. Cir. 1987); *Flynn v. United States By and Through Eggers*, 786 F.2d 586, 591 (3rd Cir. 1986).

federal law. *The Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The showing of Congressional intent must be compelling, because such an intent overrides centuries of judicial practice and tradition:

> We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied . . . . [I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities of [the Act] in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.

The Hecht Co., 321 U.S. at 329-330.

Romero-Barcelo's discussion of *TVA v. Hill*, 437 U.S. 153 (1978), upon which the government relies confirms just how rare it is – and how compelling the showing of Congressional intent must be – before this Court will hold that Congress intended to deprive the district courts of their traditional equitable discretion to fashion injunctive relief. In *Hill*, the issue was whether, by enacting the Endangered Species Act, Congress intended to deprive

the district court of its traditional equitable discretion to grant or deny an injunction barring completion of a dam that, if it became operational, would inevitably cause the extinction of an endangered species, the snail darter. This Court held in *Hill* that Congress had deprived the district court of its discretion and had mandated that an injunction issue. In *Romero-Barcelo*, this Court explained that the injunction in *Hill* was mandatory because an injunction was the *only* way to fulfill the Congressional objective of the Endangered Species Act. *Romero-Barcelo*, 456 U.S. at 314. "The purpose and language of the statute under consideration in *Hill*, not the bare fact of a statutory violation, compelled that conclusion." *Id.* at 313. In contrast, in *Romero-Barcelo*, "[a]n injunction [was] not the *only means* of insuring compliance" with federal law. *Id.* at 314. (*emphasis added*). This was so because the statute at issue in *Romero-Barcelo*, the FWCPA, like the statute at issue in this case, the CSA, 21 U.S.C. § 801 et seq., provided for *criminal penalties* in addition to a civil injunction. *Romero-Barcelo*, 456 U.S. at 314. Thus, an agency enforcing the FWCPA can ensure that Congress' goals are fulfilled by prosecuting violations under the FWCPA's criminal provisions, regardless of whether it also obtains an injunction, just as the Justice Department can under the CSA.

Accordingly, this case is indistinguishable from *Romero-Barcelo* and the result should be the same in both cases: the district court had discretion to refuse to enjoin some or all of the defendants' conduct, even if that conduct indisputably violated federal law. This Court made itself clear in *Romero-Barcelo*, and the Court of Appeals followed its prior case law interpreting *Romero-Barcelo* (*Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1155-56 (9th Cir. 1988)) when it decided *OCBC I*. *See* 190 F.3d at 1114.

There is another critical point that must be emphasized: *None* of the equitable grounds the district courts relied on in *Romero-Barcelo, Amoco,* and *The Hecht Company* amounted to a legally cognizable affirmative defense to the substantive federal law violations that the plaintiffs unsuccessfully sought to enjoin. Thus, *Romero-Barcelo, Amoco,* and *The Hecht Company* each implicitly hold that the district court may partly or completely deny equitable relief in the face of an undisputed violation of federal law, based *solely* on equitable grounds, *whether or not* those grounds would be legally cognizable defenses in a criminal prosecution or in a civil suit for damages or civil penalties.

2. The CSA Does Not Evidence an Unequivocal Statement of Intent to Divest the District Court of its Traditional Equitable Power

In *OCBC I,* the Court of Appeals reversed the district court's order denying OCBC's request to modify the preliminary injunction to exempt from its scope patients who satisfied the legal test for medical necessity drawn from *United States v. Aguilar,* 883 F.2d 662 (9th Cir. 1989). The government fails to identify anything on the face of the CSA or in its legislative history that provides the "unequivocal statement" of intent to deprive the district court of this authority, as required by this Court's precedents. *The Hecht Co.,* 321 U.S. at 329. There is nothing in the text of Section 882 or in the legislative history of Section 882 to support the government's position. *See* H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4624; S. Rep. No. 91-613, at 33 (1969). Indeed, section 882(a) provides *broad* authority to the district court to issue injunctions: "The district courts of the United States

and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of [the CSA]."

Moreover, the legislative history of the CSA itself shows that Congress had no information upon which to make any judgment about the medical necessity of cannabis when it enacted the CSA in 1970 and thus could not have intended to circumscribe the district court's equitable powers to preclude any consideration of medical necessity. Congress placed cannabis only tentatively in Schedule I when it enacted the CSA in 1970. Congress itself admitted that it did not have a firm understanding of cannabis. Months before it enacted the CSA, Congress enacted the Marihuana and Health Reporting Act, Pub. L. No. 91-296, §§ 501-503, 1970 U.S.C.C.A.N. 418, which directed the Secretary of the Department of Health, Education, and Welfare ("HEW") to prepare a report within 90 days and annually thereafter, "containing current information on the health consequences of using marihuana" and "containing such recommendations for legislative and administrative action as he may deem appropriate." *Id.* Congress ordered this report because it had found that "notwithstanding the various studies carried out, and research engaged in, with respect to the use of marihuana, there is a lack of an authoritative source for obtaining information involving the health consequences of using marihuana." *Id.*

On August 14, 1970, during the debates on the CSA but before the HEW report was to be completed, HEW advised Congress as follows:

> Some question has been raised whether the use of the plant itself produces "severe psychological or physical dependence" as required by a

> schedule I or even a schedule II criterion. Since there is still a considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marihuana be retained within schedule I at least until the completion of certain studies now underway to resolve this issue.

H.R. Rep. No. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. at 4579 & 4629. Congress also received a list of facts and "fables" about cannabis from the Director of the National Institute of Mental Health, which included the fact that cannabis is not physically addictive and the fact that use of cannabis does not necessarily lead to violence or the use of other drugs. *Id.* at 4577-78.

Congress acknowledged this debate and its own uncertainty, stating: "The extent to which marihuana should be controlled is a subject upon which opinions diverge widely." H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4577. Congress struck a compromise in response to this uncertainty. On the one hand, it tentatively placed cannabis on Schedule I, which includes substances that have "a high potential for abuse," "no currently accepted medical use in treatment in the United States, and for which "[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1) & (c), Schedule 1(c). But, to resolve the uncertainty about whether cannabis belongs on Schedule I, Congress created the bipartisan Commission on Marihuana and Drug Abuse (the "Shafer Commission"), and directed it to prepare a report to guide Congress. *Id.*; *see* Act of Oct. 14, 1970, Pub. L. No. 91-513, § 601, 1970 U.S.C.C.A.N. (84 Stat.) 1489-90.

The Shafer Commission recommended that Congress amend the CSA, and that the states amend their laws, so that possession of cannabis for personal use would not

subject the possessor to punishment, even as a misdemeanor, and "casual distribution of small amounts of marihuana for no remuneration, or insignificant remuneration not involving profit would no longer be an offense." *Marihuana: A Signal of Misunderstanding; First Report of the National Commission on Marihuana and Drug Abuse*, 152-153 (1972). The Shafer Report also confirmed that too little was known about the medical benefits of cannabis and recommended further study. *Id.* at 176.

Based on the foregoing, there is nothing in the legislative history of the CSA to support the conclusion that Congress intended to foreclose the district courts from exercising their traditional equitable discretion to incorporate a medical necessity exception into an injunction so that seriously ill and dying individuals who satisfy the legal test of medical necessity may obtain medical cannabis from an agency authorized by California law and supported by the City of Oakland and local law enforcement agencies.

Nor can the government rely on the "Sense of Congress" proclamation. The "Sense of Congress," which is buried in the Omnibus Consolidated and Emergency Supplementary Appropriations Act, 1999, Pub L. 105-277, 112 Stat. 2681-760 to 2681-761, does not have the force of law. *See Yang v. California Dept. of Social Servs.*, 183 F.3d 953, 961-62 (9th Cir. 1999) (Sense of Congress provision buried in Budget Act merely "non-binding, legislative dicta"); *see also, e.g., Boos v. Barry*, 485 U.S. 312, 327-28 (1988) (noting that proposed statute repealing District of Columbia law had been changed to Sense of Congress resolution to avoid violating home rule for District of Columbia); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (finding that provision was only statement of policy in part based on remark of bill's sponsor that it

was a "[S]ense of Congress joint resolution"). The "Sense of Congress" does not mention Section 882(a), much less purport to limit the district courts' equitable discretion under Section 882(a) or under any other statute. Accordingly, the "Sense of Congress" proclamation falls far short of being the "unequivocal statement of [Congressional] purpose" to "make such a drastic departure from the traditions of equity practice," that must exist before an Act of Congress can override a district court's equitable discretion. *See The Hecht Co.*, 321 U.S. at 329.

3. The CSA's Rescheduling Procedures Do Not Deprive the District Court of Equitable Power to Modify an Injunction to Recognize Medical Necessity Upon a Proper Showing

The government also suggests that the very existence of the administrative procedures for rescheduling cannabis limits the district court's equitable jurisdiction and makes the medical necessity defense legally unavailable. The government is mixing apples and oranges, however. When the Attorney General reclassifies a drug in a rulemaking proceeding under the CSA or the FDA approves a drug under the Federal Food Drug and Cosmetic Act ("FFDCA"), the legal treatment of the drug profoundly and universally changes. The approval or rescheduling governs its use in *all* cases for *all* purposes and for *all* individuals. *OCBC I* did not purport to make such a sweeping change in how cannabis is treated under the law. Instead, the district court merely refused the government's request to enjoin use by an extremely narrow group of seriously ill patients who meet the legal standard of medical necessity.

Nothing in *United States v. Rutherford*, 442 U.S. 544 (1979) requires a contrary result. In *Rutherford*, plaintiffs brought an *affirmative* case to exempt laetrile, an unproven drug, from the requirements of the FFDCA. OCBC does not seek that relief here and *OCBC I* did not direct the district court to grant such relief. There also was no claim in *Rutherford* that laetrile was the *only* effective treatment for the patients, and indeed there was a significant concern that these patients would forego conventional treatment in favor of laetrile. In contrast, OCBC's patient-members with a medical necessity are the target of a civil injunction action brought by the government to preclude their use of the *only* medicine that has proven effective in relieving their conditions or symptoms, pursuant to the rigorous and narrowly tailored doctrine of necessity. As the Court of Appeals recognized, if the government had sought to prosecute Respondents individually, they would have been able to litigate the issue of necessity in due course. *OCBC I*, 190 F.2d at 1114. Respondents should not be penalized because the government sought to proceed by injunction.

In this case, the administrative process continued over the course of nearly three decades. Further administrative proceedings are not a reasonable alternative for the seriously ill patients protected by the district court's amended injunction. As recognized by the district court, "it hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years if the patient requires marijuana to alleviate a current medical problem." *Cannabis Cultivators' Club*, 5 F. Supp. 2d at 1102.

C. The CSA Does Not Abrogate the Medical Necessity Defense

As discussed in Section A, *supra*, the question of whether medical necessity is available as a defense to a claimed violation of the CSA is not directly presented by the instant petition. Accordingly, consideration of that issue by this Court is premature. Even if this issue were directly presented by government's petition, however, there is no reason to conclude that the lower courts decided this issue incorrectly.

1. Nothing in the CSA Suggests that Congress Intended to Foreclose a Defense of Medical Necessity

The government points to no explicit expression of an intent by Congress to eliminate a well-recognized defense – necessity – from the CSA. Necessity is one of the oldest and most well-entrenched common law defenses in Anglo-American jurisprudence whose roots can be traced to the mid-Thirteenth Century in England, and earlier on the Continent. *See* Reeve, *Necessity: The Right To Present a Recognized Defense*, 21 New Eng. L. Rev. 779, 781-784 (1985-86); Conde, *Necessity Defined: A New Role in the Criminal Defense System*, 29 U.C.L.A. L. Rev. 409 (1981); Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289 (1974). Contrary to the government's contention, recognition of a necessity defense does not undermine the rule of law. "[T]he necessity defense proclaims legal some conduct which, in other contexts, would plainly be illegal. . . . *The defense is not aimed at subverting existing laws or at hastening their demise. Rather, the defense simply recognizes that, in certain circumstances, the choice made by the defendant is a choice that*

society would also have made and now is given the opportunity to ratify." United States v. Dorell, 758 F.2d 427, 436 (9th Cir. 1985) at 436 (Fergusen, J., concurring) (*emphasis added*).

Moreover, Courts should be particularly reluctant to assume the legislature has foreclosed the justification of necessity when, as in this case, the justification arises in the context of an individual's assertion of a constitutionally protected right. Where the constitutional right at stake is the individual's constitutionally protected autonomy with regard to his own health decisions, a claim of necessity must rank especially high.

Indeed, in the context of medical cannabis, the District of Columbia court carefully noted the constitutional protection given to an individual's personal health decisions in upholding an individual's claim of necessity to justify the use of cannabis to save his sight from the ravages of glaucoma:

> "[A] law which apparently requires an individual to submit to deteriorating health without proof of a significant public interest to be protected raises questions of constitutional dimension."

United States v. Randall, 104 Daily Wash. L. Rep. 2249, 2253 n.29 (D.C. Super. 1976).

The government points to nothing in the text or legislative history of the CSA that evidences any intent to abrogate a medical necessity defense. As discussed in Section B.2 *supra*, Congress had no information upon which to make any judgment about the medical necessity of cannabis when it enacted the CSA in 1970. Act of Oct. 14, 1970, Pub. L. No. 91-513, 84 Stat. 1236, codified as amended at 21 U.S.C. §§ 801 *et seq.*

Moreover, absent some unambiguous statement by Congress that it intended to eliminate necessity as a

defense, the CSA, a criminal statute, cannot be read to preclude that defense in *all* circumstances. *See United States v. Granderson*, 511 U.S. 39, 49 (1994) (the government cannot rely on general statements that Congress intended to "get tough on drug offenders"; instead, the government must point to specific evidence that Congress expressed intent on the narrow issue in question). The CSA must be interpreted using "the ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom the penalties are sought to be imposed." 3 Sutherland Stat. Const. § 59.03, p. 102 (5th ed.). When, as in this case, the "text, structure, and history fail to establish that the government's position is unambiguously correct – [courts] apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *Granderson*, 511 U.S. at 54.

In this case, there is nothing in the text of the CSA suggesting that Congress intended to abrogate the ancient, universally applicable common law defense of necessity. Accordingly, the lower courts' recognition of the defense to exempt those with a medical necessity is consistent with well-established law.

Finally, the "Sense of Congress" does not evidence an intent to eliminate necessity as a defense to a claimed violation of the CSA. The "Sense of Congress" does not purport to amend the CSA, expressly or by implication. The plain language of the "Sense of Congress" merely reaffirms that cannabis can be moved from Schedule I and thus legalized for medical use by the general public *only* through the administrative process set out in the

CSA. Because neither *OCBC I* nor the district court purported to move cannabis from Schedule I of the CSA to some other schedule or generally to legalize medical cannabis *across the board* for *all* people under *all* circumstances, the "Sense of Congress" has no bearing on the issues before this Court. Moreover, the "Sense of Congress" does not specifically mention the common law defense of medical necessity. In the absence of an unambiguous statement of an intent to foreclose that defense under the CSA, the defense remains available.

2. Recognition of a Defense of Medical Necessity for Cannabis Use Is Not Inconsistent with the Classification of Marijuana on Schedule I of the CSA

Under Section 812(b)(1) of the CSA, substances may be classified on Schedule I for the following reasons: (1) the substance has a high potential for abuse; (2) the substance has no accepted medical use in treatment in the United States; and (3) there is a lack of accepted safety for use in treatment of the substance under medical supervision. The government argues that because a Schedule I drug by definition has "no currently accepted medical use," any justification for use asserted on the basis of "medical necessity" could not have been within legislative contemplation. This argument necessarily presumes that the terms "accepted medical use in treatment" and "medical necessity" are equivalent expressions and have exactly the same meaning. These concepts plainly serve different purposes, however. While "medical necessity" focuses on the urgent needs of a specific patient, the term "accepted medical use in treatment" applies to use by the general public as a whole. Accordingly, there is no reason to conclude that the Schedule I classification has any

bearing on the availability of a medical necessity exception for a single patient.

The validity of the government's position turns on what Congress meant by the phrase "accepted medical use in treatment" in defining Schedule I controlled substances. In construing the term, first resort should be to the plain meaning of the words used. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The words used suggest that a medical use is one that is generally accepted by the medical community.

The legislative history of the CSA confirms the importance to be attached to the opinions of qualified medical experts. During hearings before the House Subcommittee on Foreign and Interstate Commerce, representatives of pharmaceutical companies and medical researchers voiced concern that the Federal Bureau of Narcotics and Dangerous Drugs would have total authority to determine whether drugs have accepted medical uses in treatment. Addressing this concern, Deputy Chief Counsel for the BNDD, Michael Sonnenreich, testified that the determination of accepted medical use "will be made by the medical community." Drug Abuse Control Amendments – 1970: Hearings Before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Cong., 2d Sess. (1970) at 698. There is also a parallel between the phrase "accepted medical use" and the standard widely used to determine the competency and admissibility of scientific evidence, *i.e.*, whether there is general acceptance of a technique in the relevant scientific community. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).[2] Reliability of evidence does not depend

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[2] In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993), the court held that Federal Rule of Evidence 702

upon unanimous belief or universal agreement, however. The admissibility standard implicitly recognizes that even a technique that is not generally accepted could nevertheless be effective in an individual situation. Similarly, a patient could consent to a unique form of medical treatment that is not generally accepted, as long as the risks were fully explained. A physician administering such treatment would not be engaged in malpractice.

So understood, an "accepted medical use" is one that would be generally recognized by medical experts as being reliable and effective for general medical purposes based upon widely available safety and efficacy studies. Consequently, a medical use that is efficacious only in a unique, special, or isolated individual case would, for that reason alone, not constitute an "accepted medical use." Thus, a Schedule I drug is one that does not have a recognized or *generally* accepted medical use, even though it might have an effective individualized or idiosyncratic use.

Viewed from this perspective, the concept of "medical necessity" reflects the reality of medical practice. A physician can freely resort to the generally accepted pharmacopoeia in the general treatment of patients. But when generally accepted treatments are ineffective, the physician and the patient may jointly agree that medical necessity requires treatment that is not generally accepted. The medical necessity test applies to a particular patient or class of patients, and provides a safety valve for the individual patient who has exhausted other treatments. The CSA's criteria are not at war with good medical

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replaced the *Frye* test, but that "general acceptance" is still a relevant consideration in determining admissibility of scientific evidence.

practice, and good medical practice requires that physicians keep searching, even when conventional, "generally accepted" remedies do not work.

Finally, the legal test for "generally accepted medical use" and the legal test for medical necessity are quite different and serve different purposes. In *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994), the court upheld a new five-part test formulated by the DEA to determine whether a drug is in "currently accepted medical use":

(1) The drug's chemistry must be known and reproducible;

(2) There must be adequate safety studies;

(3) There must be adequate and well-controlled studies proving efficacy;

(4) The drug must be accepted by qualified experts;

(5) The scientific evidence must be widely available.

Id. at 1135, citing 57 Fed. Reg. at 10,506. These guidelines are intended to scrutinize a drug for use by the *general public*. The legal standard for medical necessity is quite different, however. It requires a showing by: "[1] people with serious medical conditions [2] for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; [3] who will suffer serious harm if they are denied cannabis; and [4] for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects. *OCBC I*, 190 F.3d at 1115. The medical necessity test applies to a *particular patient*, and provides a safety valve for a person who must act to prevent a greater harm. Thus, the two standards have no bearing on each other.

CONCLUSION

OCBC I has no impact on the government's ability to prosecute individuals for violating federal drug laws. Because this is not a criminal prosecution, neither the Court of Appeals nor the district court had any occasion to decide whether and how the medical necessity defense would apply in a criminal prosecution. Instead, *OCBC I* dealt *only* with whether the district court has equitable discretion to shape a civil preliminary injunction under 21 U.S.C. § 882 so that it excludes those who satisfy a narrowly defined four-part medical necessity test to save lives and reduce suffering. The Court of Appeals has had no opportunity to review the district court's July 17, 2000, orders, and this Court has stayed those orders. Thus, there is no reason for this Court to intervene in a case that is not yet ripe for its review. For these reasons, the government's petition should be denied.

Respectfully Submitted,

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October 30, 2000.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. OAKLAND CANNABIS BUYERS' COOPERATIVE, Defendant-Appellee.	No. 00-16411 DC# CV-98-88-CRB Northern California ORDER (Filed Aug. 11, 2000)

Before: SCHROEDER, REINHARDT and SILVERMAN, Circuit Judges

This panel accepts appeal no. 00-16411 as a comeback matter relating to *United States of America v. Oakland Cannobis Buyers' Coop.*, 190 F.3d 1109, (9th Cir. 1999) (per curiam). The Clerk shall so note on the docket, and forward further filings in this appeal to this panel.

Appellant's opposed emergency motion under Circuit Rule 27-3 for a stay pending appeal and Supreme Court review is DENIED.

The briefing schedule established on July 28, 2000, is vacated. The appeal filed July 25, 2000, is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3

shall apply. The Clerk shall reset the briefing schedule accordingly.

MEMORANDUM TO CLERK
Pursuant to General Order
No. 6.9, I certify that
Judges MMS, SR + BGS
concur in this order and
authorize its filing.

/s/ Curt Pham
Motions Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. OAKLAND CANNABIS BUYERS' COOPERATIVE, Defendant-Appellee.	No. 00-16411 DC# CV-98-88-CRB Northern California ORDER (Filed Aug. 11, 2000)

This is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply, and the briefing schedule is set as follows. If they have not already done so, within 7 days after entry of this order, the parties shall make arrangements to obtain from the court reporter an official transcript of proceedings in the district court which will be included in the record on appeal. The opening brief is due August 22, 2000; the answering brief is due September 19, 2000; and the optional reply brief is due within 14 days of service of the answering brief. *See* 9th Cir. R. 3-3(b).

If appellant fails to file timely the opening brief, this appeal will be dismissed automatically by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

For the Court

/s/ Curt Pham
Curt Pham
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. OAKLAND CANNABIS BUYERS' COOPERATIVE, Defendant-Appellee.	No. 00-16411 DC# CV-98-88-CRB Northern California ORDER (Filed Oct. 10, 2000)

Appellee's motion for leave to file an oversized answering brief is granted. The Clerk shall file the answering brief served on September 19, 2000.

Appellant's motion for an extension of time to file the reply brief is granted. The reply brief is now due October 10, 2000.

Upon receipt of the reply brief, this case will be ready for calendaring.

For the Court

Cathy A. Catterson
Clerk/Court Executive

By

/s/ Manning Evans
Manning Evans
Motions Attorney/
Deputy Clerk

No. 00-16411

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants-Appellees.

Appeal from Order Modifying Injunction by the United States District Court for the Northern District of California
Case No. C 98-00088 CRB
entered on July 17, 2000, by Judge Charles R. Breyer.

APPELLEES' MOTION TO EXPEDITE APPEAL

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This is an appeal from an order modifying a preliminary injunction, entered by the district court on July 17, 2000. The merits panel that heard the first appeal in this case, Schroeder, Reinhardt, and Silverman, JJ., retained jurisdiction to decide this appeal. *See United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109, 1115 (9th Cir. 1999) *(OCBC I), petn. for cert. filed* July 28, 2000.

On August 11, 2000 the merits panel issued two orders that struck a balance between the interests of the Appellees, the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively "OCBC"), and the Appellant, the United States. On the one hand, the panel denied the Government's request for a stay of the district court's July 17, 2000 Order. On the other hand, the panel ordered that briefing be expedited pursuant to Ninth Circuit Rule 3-3(b) (preliminary injunction appeals).

Despite the August 11, 2000 Order, the Government moved for a seven-day extension of time to file its reply brief, up to and including October 10, 2000. OCBC opposed the Government's motion. The motion was granted in an Order filed on October 10, 2000. The October 10, 2000 Order was signed by Manning Evans, Motions Attorney/Deputy Clerk. It does not state whether the Government's motion was referred to or considered by the merits panel.

The case is now fully briefed. Because the merits panel that decided *OCBC I* retained jurisdiction, this case, unlike most preliminary injunction appeals, will not be "referred to the next available motions/screening panel for disposition." Ninth Circuit Rule 3-3(d). Instead, it must be referred to the prior merits panel for disposition. *See id.*

OCBC respectfully requests that this case be placed before the merits panel for disposition as soon as possible and that all further proceedings be expedited. *See* Ninth Circuit Rule 3-3(e) ("If a party files a motion to expedite the appeal . . . , the Court may order a . . . procedure for disposition of the appeal that differs from the schedule and procedure set forth in subparagraphs (b) and (d)."); Ninth Circuit Rule 27-12 ("Motions to expedite . . . hearing may be filed and will be granted upon a showing of good cause."); *see also* 28 U.S.C. § 1657(a) ("Notwithstanding any other provision of law, each court of the United States shall . . . expedite consideration of any action . . . for temporary or preliminary relief. . . . "); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir.) (noting the "priority and expedited decision that we must give appeals from preliminary injunctions under 28 U.S.C. § 1657 and Ninth Circuit Rule 3-3"), *cert. denied*, 522 U.S. 963 (1997); *Gregorio T. v. Wilson*, 54 F.3d 599, 600 (9th Cir. 1995) ("28 U.S.C. § 1657 and Ninth Circuit Rule 34-3 give priority to preliminary injunction appeals. In addition, recently adopted Ninth Circuit Rule 3-3 (effective July 1, 1995) automatically expedites briefing and decision in preliminary injunction appeals.").

OCBC seeks expedited consideration because of the United States Supreme Court's ruling in *United States v. Oakland Cannabis Buyers' Club*, 530 U.S. ___, 69 U.S.L.W. 3165 (Aug. 29, 2000). After this Court issued its August 11, 2000 Order denying the Government's motion to stay the district court's July 17, 2000 Order, the Government requested a stay from Supreme Court Justice Sandra Day O'Connor, sitting as the Circuit Justice for the Ninth Circuit. Justice O'Connor referred the Government's

application to the full Court, which granted the Government's application by a vote of 7 to 1, with Justice Breyer not participating. The Supreme Court stayed the July 17, 2000 Order the Government challenges in this appeal, "pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of this Court." Justice Stevens dissented, stating:

> Because the [Government] has failed in this case to demonstrate that the denial of necessary medicine to seriously ill and dying patients will advance the public interest or that the failure to enjoin the distribution of such medicine will impair the orderly enforcement of federal criminal statutes, whereas [OCBC has] demonstrated that the entry of a stay will cause them irreparable harm, I am persuaded that a fair assessment of that balance favors a denial of the extraordinary relief that the government seeks.

OCBC's opposition to the Government's petition for certiorari review of *OCBC I* is due on and will be filed on Monday, October 30, 2000.

The Supreme Court's stay ruling effectively reinstated the broad preliminary injunction that this Court reversed in *OCBC I*. Thus, the Government now has all the relief it seeks, and OCBC is in the same position it occupied before this Court ruled in *OCBC I:* OCBC is enjoined from distributing medicinal cannabis to its seriously ill and dying patients, regardless of whether those patients satisfy the four-part test for medical necessity set forth in *OCBC I* and in the district court's July 17, 2000 Order.

This Court has recognized how critical it is that OCBC's patients receive the medicinal cannabis they so desperately need:

> OCBC has identified a strong public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses. Indeed, the City of Oakland has declared a public health emergency in response to the district court's refusal to grant the modification under appeal here. Materials submitted in support of OCBC's motion to modify the injunction show that the proposed amendment to the injunction clearly related to a matter affecting the public interest. . . .
>
> OCBC submitted the declarations of many seriously ill individuals and their doctors who, despite their very real fears of criminal prosecution, came forward and attested to the need for cannabis in order to treat the debilitating and life threatening conditions.
>
> In short, OCBC presented evidence that there is a class of people with serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; who will suffer serious harm if they are denied cannabis; and for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.
>
> The government, by contrast, has yet to identify any interest it may have in blocking the

> distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes. It has offered no evidence to rebut OCBC's evidence that cannabis is the only effective treatment for a large group of seriously ill individuals, and it confirmed at oral argument that it sees no need to offer any. It simply rests on the erroneous argument that the district judge was compelled as a matter of law to issue an injunction that is coextensive with the facial scope of the statute.

OCBC I, 190 F.3d at 1114-1115. This Court implicitly reconfirmed its conclusions by denying the Government's stay motion on August 11, 2000.

Because of the Supreme Court's August 29, 2000, stay order, every day that this appeal remains pending is another day that OCBC's patients will not receive the medicinal cannabis they so desperately need. Every day will also be another day on which the will of the People of the State of California, expressed in Proposition 215 and the ordinances passed by the City of Oakland, is frustrated.

OCBC respectfully requests that this Court expedite the disposition of this appeal to the fullest extent possible. If this Court concludes that oral argument would be beneficial, OCBC respectfully requests that it schedule oral argument as soon as possible.

Dated: October 26, 2000

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By: /s/ John H. Quinn
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PROOF OF SERVICE BY FACSIMILE TRANSMISSION

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years; and that the document described below was transmitted by facsimile transmission to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause.

I further declare that on the date hereof I served a copy of:

APPELLEES' MOTION TO EXPEDITE APPEAL

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 26th day of October, 2000.

Margarita Colin	/s/ Margarita Colin
(typed)	(signature)

PROOF OF SERVICE BY MAIL
(FRAP 25(d))

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